DEC 24
CHARLES ELMORE

No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE W. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled case, entered on November 19, 1936.

OPINIONS BELOW

The charge of the trial court appears at R. 48–61. The opinion of the Circuit Court of Appeals (R. 66–77) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 19, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act

of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a witness who wilfully perjures himself renders himself immune to indictment if, before the end of the proceedings, he again takes the witness stand and testifies truthfully as to the matters concerning which he theretofore testified falsely.

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Section 231), reads as follows:

> *Perjury.* Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath, state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

The Honorable George W. Norris, United States Senator from the State of Nebraska, was a candidate for reelection in 1930 (R. 28). In the campaign of 1930, certain political strategists in Ne-

braska procured another George W. Norris, of Broken Bow, Nebraska, to file for the Republican nomination for United States Senator (R. 34–36). In consideration for filing in opposition to Senator Norris the respondent was paid $50.00 to cover his filing fee and was given $500.00 for campaign expenses and was promised a further sum of $500.00 if he did not withdraw within the period permitted by law for withdrawals (R. 35). The money was furnished by Victor Seymour, whose conviction of perjury in testifying before the special Senate Committee investigating this matter was affirmed by the Circuit Court of Appeals for the Eighth Circuit in *Seymour* v. *United States*, 77 F. (2d) 577.

This conspiracy came to the attention of a special Senate Committee headed by Senator Gerald P. Nye of North Dakota, which had been directed to investigate campaign expenditures and all relevant facts with relation thereto which would be of public interest and which would aid the Senate in the enactment of remedial legislation. This Committee was empowered to issue process and to administer oaths. See Senate Resolution No. 215, 72 Cong. Rec. 3967 (R. 26–27). This Special Senate Committee met at Broken Bow, Nebraska, July 19, 1930, and at Lincoln, Nebraska, July 21, 1930, and September 22–24, 1930 (R. 30–31). The respondent, George W. Norris (of Broken Bow), testified before the Committee on September 22, 1930, that he had been paid no money

and had received no assurance whatever of financial support for his campaign for nomination for the United States Senate (R. 33). At this time the respondent was represented by counsel present at the hearing (R. 41) and admittedly knew that the above statements were false (R. 43–46). The following day, September 23, 1930, after seven other witnesses had testified and after hearing (R. 41) at least a part of the testimony of witness Johnson (R. 34–38), exposing the falsity of respondent's testimony, the respondent again took the stand and gave testimony which served in part at least to correct his earlier false testimony (R. 47–48).

The respondent was convicted of perjury (R. 14–15). His motion for a new trial was overruled (R. 17) and he was sentenced to pay a fine of $100.00 and be imprisoned in jail for a period of three months (R. 18). He appealed to the Circuit Court of Appeals for the Eighth Circuit, which reversed the judgment of the trial court and remanded the cause for a new trial at which it could be determined whether or not he had purged himself of all of his false testimony.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the trial court erred in refusing to submit to the jury the question whether respondent had fully and fairly retracted and corrected his original false testimony.

2. In reversing the judgment of the United States District Court for the District of Nebraska.

REASONS FOR GRANTING THE WRIT

The court below held that the jury should have been instructed to find respondent not guilty if he, "while the hearing was continuing and unfinished again took the witness stand and then and there fully corrected all erroneous or false statements."

This decision flies in the teeth of Section 125 of the Criminal Code, *supra,* which, without qualification as to subsequent correction, punishes "whoever * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true."

The decision presents an alarming obstacle to effective judicial, legislative, and administrative investigation. A witness may take the stand and, with relatively complete impunity, give whatever false testimony may serve his purpose. If other witnesses persuasively contradict him, he needs only to change his testimony so that it harmonizes with the facts then known in order to escape all consequences of his perjury. So interpreted, the perjury statute is no longer an effective sanction to insure that honest testimony be given but becomes merely a procedural device through which the truthful testimony, if interposed to refute the perjury, may subsequently corroborated by the per-

jurer. If the perjury be uncontradicted at the hearing or trial, the perjurer may remain silent, running only the slight risk that there may be a subsequent investigation which will reveal his perjury.

The facts of this case serve as a striking example of the consequences of such a rule. The conspirators, distinguished more by their knavery than by their subtlety, sought to impede the reelection of a distinguished public servant by promoting the candidacy of respondent, who bore the same name. Upon investigation of the Senate Committee he at first stoutly maintained that his was a purely voluntary and unsolicited desire to run for the United States Senate and that no one had given him money or assurance of financial aid (R. 33). Other witnesses then testified that he had been paid $50, had received a $500 bond and had been promised another $500 if he did not withdraw (R. 35, 39). The respondent then took the stand and gave new testimony which was in partial conformity with that offered by other witnesses (R. 47–48). We submit that the whole purpose of the perjury statute is defeated if the respondent be held beyond punishment for his deliberate deception of the investigating committee merely because, one supposes, he subsequently recognized that this deception was unsuccessful.

The court below relied upon several common-law cases decided by the English and state courts. *Roy*

v. *Carr,* 1 Sid. 418, 82 Eng. Rpt. 1191; *People* v. *Gillette,* 126 A. D. 665; *People* v. *Brill,* 100 Misc. 92; *Henry* v. *Hamilton,* 7 Blackf. (Ind.) 506; *Brannen* v. *State,* 94 Fla. 656. In each of these cases the alleged perjury was corrected by the witness voluntarily and not, as here, after an interval during which there was introduced contradictory evidence for the witness to weigh with an eye toward a perjury prosecution. *Bijur* v. *Bendix,* 285 Fed. 974, 975 (App. D. C.) was a patent interference suit in which the court rejected an attempt to defeat priority because of a supposed perjury, where the witness "rectified it almost immediately, saying that he had misunderstood the first question." It is of some significance that in *Matter of Popper,* 193 A. D. 505, a disbarment case, the court emphasized the fact that the perjury was corrected after knowledge of its refutation, and held the principle of *People* v. *Gillette, supra,* inapplicable; the case, however, was rested on the distinction between the standards required for disbarment and for conviction. And in *Martin* v. *Miller,* 4 Mo. 47, where the report does not show whether or not the correction was made after contradictory evidence, the court held, in an action of slander, that subsequent correction could not purge the original testimony.

The court below was, we submit, on far sounder ground in its decision of *Seymour* v. *United States,* 77 F. (2d) 577. There it held that Seymour's

subsequently telegraphed offer to correct his testimony did not condone his perjury, and said (p. 582):

> When false testimony concerning a material fact has been knowingly given, perjury has become and continues to be an accomplished and completed thing.

The facts of the two cases are distinguishable, but the *Seymour* case, in contrast to the one at bar, recognizes the basic principle of the crime of perjury.

This case presents a question of continuing importance to the processes of judicial, legislative, and executive investigation. The decision below, unless corrected, would tend to reduce the perjury statute to a status which may often, as in this case, be one of practical impotence. While the crime for which the indictment was found was perjury, an old common-law offense, its effect upon the complicated investigations of modern government cannot be overemphasized. Particularly is this true when the investigation is one which, as here, is based on determining the need for future legislation to protect the integrity of the citizens' choice of governmental officials.

Wherefore, it is respectfully submitted that this petition presents a question of importance which has not been, but should be, decided by this Court and should, therefore, be granted.

STANLEY REED,
Solicitor General.

DECEMBER 1936.

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